IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
November 7, 2006 Session

LAUREN EUGENE LESLIE v. GENE LESLIE

Appeal from the Circuit Court for Monroe County
No. V03081 H John B. Hagler, Jr., Judge

No. E2006-00043-COA-R3-CV - FILED MARCH 30, 2007

The plaintiff, Lauren Eugene Leslie, fell down steps at his parents' home as he was carrying a toilet that he had removed from their "powder room." The plaintiff filed this suit against his father, Gene Leslie, alleging negligence. Both the plaintiff and his father testified at trial that the plaintiff fell because he tripped over a bowl of dog food that had been left on the steps by the defendant. This version of how the accident happened was at odds with a statement given by the defendant to an insurance adjuster one month after the accident. Following a bench trial, the court concluded that the plaintiff had failed to prove that his fall was caused by the bowl of dog food. The plaintiff appeals, challenging the trial court's credibility determinations and conclusion that causation had not been proven. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS. P.J., and D. MICHAEL SWINEY, J., joined.

Peter Alliman, Madisonville, Tennessee, for the appellant, Lauren Eugene Leslie.

Clifford E. Wilson, Madisonville, Tennessee, for the appellee, Gene Leslie.

OPINION

I.

The complaint in this negligence action[1] seeks damages in the amount of $500,000. According to the complaint, the plaintiff's parents had a toilet that was leaking and the plaintiff went to their residence to assist them in addressing this problem. The plaintiff eventually determined that the toilet needed to be replaced. He unhooked the toilet for the purpose of carrying it outside. The complaint recites the following:

> Unbeknownst to Plaintiff and after Plaintiff had entered the residence, Defendant Gene Leslie had moved several pet feeding bowls to the bottom of the steps used by persons to enter and exit the residence.
>
> As Plaintiff was exiting the residence carrying the toilet, he tripped over the bowls, causing him to fall.
>
> When Plaintiff fell, the toilet bowl struck the concrete, shattered and caused serious, severe and permanent injuries to Plaintiff's arms, hands and body.
>
> Plaintiff was immediately transported to the University of Tennessee Medical Center where he had extensive surgery performed and where he is still undergoing treatment.

(Paragraph numbering in original omitted). The plaintiff alleged that the defendant failed to exercise ordinary care and that the defendant's negligence was the proximate cause of the plaintiff's serious injuries.

The defendant responded to the complaint, generally denying any liability to the plaintiff. He maintained that he did not know the plaintiff was going to remove the toilet or that he was going to exit the residence through the garage while carrying the toilet. The defendant averred that when he saw the plaintiff carrying the toilet, he offered assistance, which was refused. The defendant denied that he was negligent and asserted that, in the event he was negligent, his negligence was outweighed by the plaintiff's fault in failing to take reasonable steps to avoid the accident.

This incident took place on August 25, 2002. *One month* after the accident, Greg Dunn, an insurance adjuster, took a recorded statement from the defendant. This statement was admitted into evidence at trial. It includes the following exchanges:

> Adjuster**:** Can you sort of describe to me what happened that day?

[1] The plaintiff initially also sued his mother, Faye Leslie. He subsequently non-suited the suit against her.

Defendant**:** Yes. The commode is a one piece Kohler, meaning that the tank and the commode part is all one piece and it's a heavy item and it was leaking. And he was trying to make an adjustment on the valve to keep it, you know from leaking. And he saw that it was . . . the hole inside of it had been there for a while and it was going to need some extra work. So in order to keep the water out of the house and everything, he just disconnected it and was carrying it through the laundry room out into the garage and as he went out into the garage, he was walking real low with it so he could let it down easy and he tripped going out the steps, there is two steps from the laundry room to the garage and he tried to save the commode and he . . . You know, it just broke on the concrete floor and just ate his arms up.

* * *

Adjuster**:** Do you know what he tripped over?

Defendant**:** No, I think he . . . I think it was just the strain he was in, carrying the commode and going down the steps.

* * *

Adjuster**:** He tripped . . . from the strain of the commode. Anyhow, was there anything in the garage that tripped him?

Defendant**:** Well there was a couple of little rugs out there, I don't know if one of them slid or not.… [T]here's always something laying in the garage.

* * *

Adjuster**:** Anything else I haven't asked you that you feel maybe (sic) important?

Defendant**:** No, Greg not that I know of.

After the defendant's motion for summary judgment was denied, a bench trial took place on November 18, 2005. We will limit our discussion of the trial testimony to that which is pertinent to this appeal.

The plaintiff testified that his mother asked him to fix a leaking toilet at their house. After the plaintiff examined the toilet, he concluded that it had to be replaced. The plaintiff made three or four trips from the house to his truck before he disconnected the toilet. The plaintiff said that on each of these trips, there were no obstructions on the stairs leading to the garage. In order to remove the toilet and take it to the garage, the plaintiff had to pass through a door leading into the garage and then go down two steps to the floor of the garage. After the final trip from his truck to the house, it took the plaintiff approximately three to five minutes before he was ready to remove the toilet. The plaintiff testified as follows:

> A. I was backing out of the laundry room.[2] I squatted over backward kind of duck walking, straddling [the toilet] between my legs. It was full of water. So you kind of got to keep it level, you know, as much as you can and – I sat down. I straighten back up.
>
> And Mom says to Dad, "Help him. Help him. Do something, Gene."
>
> Q. What did you say?
>
> A. Dad's got a bad leg, and he can't really do anything, and I know that, but he can – I ask[ed] him to get the doors for me.… So Dad opens the doors, comes back in, I think, somewhere in the kitchen area.… I was facing the powder room door, and he had opened these doors and then come back and went to the kitchen.

The plaintiff described his posture as walking like a "duck." After the defendant opened the doors, the plaintiff continued toward the garage. He could only see in front of him by looking over the top of the commode tank. He could see the floor located several feet in front of him but, as he started to descend the steps to the garage, his view of the steps was blocked by the toilet. The plaintiff went through the door to the garage and placed his left foot on the first step. The plaintiff then proceeded to take the next step when:

> my foot hits a – a dog bowl, and I lose my balance.… [W]hen my foot hit [the dog food bowl], it knocked all the dog food and scattered it. I lost my balance there, and I was just – my

[2]Apparently, the plaintiff's route from where the toilet had been located took him through the laundry room.

> hands [were] on the very bottom of the commode, and I didn't want to fall and just, you know, tear my fingers. I mean, that was my first thought, and I was just looking at – they'd bought a new Cadillac over here when – when I'm coming down the steps, they had a new Cadillac, and I didn't want to hit it. You know, I'd never hear the end of that, and so, I was trying to go over this way… and I – I just couldn't keep my own balance. . . .

The plaintiff added that his father knew, in advance, which route he would be taking in removing the toilet because his father had opened certain doors so the plaintiff could pass. The plaintiff's father did not tell the plaintiff, prior to his fall, that he had put a bowl of dog food on one of the steps.

The plaintiff's injuries were severe. He was flown by helicopter to the University of Tennessee Medical Center in Knoxville because the ambulance attendants were concerned that he might lose one of his arms. The plaintiff's medical bills total $20,963.99.

The plaintiff testified that, a few weeks after the accident, he spoke with his father about what happened. His father told him that he was feeding the dogs and he should have told him where he had placed the dog food bowl. The defendant apologized to his son. On cross-examination, the plaintiff acknowledged that his parents did not know that he was going to remove the toilet until he had already unhooked it and moved it out into the hallway. When the defendant placed the feed bowl on the steps, he did not know that the plaintiff would soon be going down those steps with the toilet.

The plaintiff grew up in the house where his parents live. He stated that his parents usually fed the dogs by putting their bowls on the "ledger"[3] next to the steps. The plaintiff stated that it was unusual for his parents to put the bowls on the steps, but that the reason his father did so on the day in question was because their new Cadillac[4] took up more room in the garage than was normally the case. The plaintiff maintained that he did not foresee that an accident might occur.

The next witness was the plaintiff's mother, Mrs. Rachel Faye Leslie. Mrs. Leslie testified that she had told her son on several occasions that the toilet needed to be fixed. Mrs. Leslie testified as follows with respect to the evening of the accident:

> Lauren was finished in the kitchen, and he proceeded to take a tool or two – I don't know what kind, but he took some tools into the powder room and attempted to work on the commode, and I noticed that this

[3]The meaning of the word "ledger" is not defined in the record.

[4]The defendant testified that the garage was crowded because of an RV.

> was going on for several minutes and awhile, and – and he went in and out a couple of times to get more tools, and then he came in, and he made a statement concerning the fact the commode couldn't be fixed and that he was going to take it out.
>
> And so, after a few minutes he started – I saw him back up with – he was real hunkered down, and he was coming out the powder room door backwards, and then he came on out into the hall. And when he came out, I said, "Let your daddy help you."
>
> And then I hollered for Gene. I wasn't sure where he was. I hollered, "Gene, come and help Lauren."
>
> So Gene come out of the kitchen area, and Lauren goes to the – close to the door, the first door you come to. And so, Lauren said, "Dad, I don't want you to help me. Just open the door." . . . And so, Gene proceeded to open the door, and then Lauren goes out the garage. Gene closes the door to the garage.

Mrs. Leslie further stated that she stepped on spilled dog food on the garage floor after the accident and that the dog food bowl must have been in front of the steps in order for her son to have stepped on it.

Mrs. Leslie candidly acknowledged that she hoped her son would win the lawsuit because, in her opinion, he deserved compensation for his injuries. Mrs. Leslie added that one reason the lawsuit was filed was because "Farm Bureau was not willing to pay for his bills."[5] Mrs. Leslie went on to say that she and her husband took their son on his initial visit to see his current attorney.

The plaintiff's final witness was his father, the defendant Gene Leslie. He testified with respect to the feed bowls:

> I was in the kitchen, and Faye had finished and gone to the den, and I noticed [Lauren was] in there working on the commode, and I heard doors popping and going, you know, and he was going in and out.… And then a little later on I heard him talking.… And then after a while the dogs started barking, and I went in the laundry room and rounded their bowls up and set them out there on the steps for them to eat.

The defendant then stated that he filled up two bowls of dog food, and placed one of them on the steps and the other on the floor. The defendant typically placed the bowls on the "ledger," but

[5] As one might expect, the trial court instructed Mrs. Leslie to avoid the topic of insurance. Defense counsel thereafter waived any objection to insurance being discussed.

because the RV had blocked an area of the garage,[6] he placed one of the bowls on the steps. The defendant testified that when his son came out of the powder room carrying the commode, he knew at that time that his son was taking the commode to the garage. Even though the defendant had just placed one of the dog food bowls on the steps, he did not warn his son. The defendant claimed that he simply forgot to warn him because everything was happening so fast. On cross-examination, the defendant acknowledged that when he placed the dog food bowl on the steps, at that point in time he did not know that his son would be taking the commode into the garage. The defendant testified that it was not until Thanksgiving time in 2002 before he realized that his son had tripped on the dog food bowl that he had placed on the stairs.

When the proof was completed, the trial court announced its decision from the bench. In pertinent part, the trial court said as follows:

> With respect to the cause of the accident, I find that the plaintiff has also failed to prove that the dog bowl or a dog bowl caused his fall. There's some serious conflict in the evidence here with respect to causation in this case. If I understood the testimony correctly, the plaintiff said that his father told him at the hospital that the dog bowl caused the fall, and the father's testimony here was somewhat similar, but these statements are all impeached by the statement which the father gave in Exhibit 14 about a month after the accident.
>
> And he was asked, "Do you know what he tripped over?"
>
> "Answer: No, I think he – I think it was just the strain he was in carrying the commode and going down the steps."
>
> No mention about tripping over a dog bowl a month after this accident . . . .
>
> [The statement provided to the insurance adjustor] impeaches testimony which has been given in this case and causes me to conclude that the plaintiff has actually failed to prove what caused his accident, and I think it's just as reasonable to conclude under these circumstances that the accident was caused by the fact that he was carrying this very heavy commode, had water in it, was having to carry it in a very difficult position. Everybody was just trying to rush around to let him get through the house with this commode. There was no prior warning to anyone that he was going to do that.…

[6] See footnote 4.

The trial court entered a final judgment for the defendant which incorporated the above findings announced from the bench following trial.

II.

The plaintiff appeals claiming the trial court erred in basing its judgment for the defendant on credibility determinations which were not supported by the record. The plaintiff also claims the trial court erred when it determined that the defendant was not negligent.

III.

In this non-jury case, our standard of review is *de novo* upon the record of the proceedings below; however, the record comes to us with a presumption of correctness as to the trial court's factual determinations, a presumption we must honor unless the evidence preponderates otherwise. Tenn. R. App. P. 13(d); ***Wright v. City of Knoxville***, 898 S.W.2d 177, 181 (Tenn. 1995). Our review of questions of law is *de novo* with no presumption of correctness attaching to the trial court's conclusions of law. ***Campbell v. Florida Steel Corp.***, 919 S.W.2d 26, 35 (Tenn. 1996).

IV.

In his brief on appeal, the plaintiff acknowledges that the primary issue on appeal involves the trial court's credibility determinations. In ***Wells v. Tennessee Bd. of Regents***, our Supreme Court discussed witness credibility stating:

> Unlike appellate courts, trial courts are able to observe witnesses as they testify and to assess their demeanor, which best situates trial judges to evaluate witness credibility. *See State v. Pruett*, 788 S.W.2d 559, 561 (Tenn. 1990); *Bowman v. Bowman*, 836 S.W.2d 563, 566 (Tenn. Ct. App. 1991). Thus, trial courts are in the most favorable position to resolve factual disputes hinging on credibility determinations. *See Tenn-Tex Properties v. Brownell-Electro, Inc.*, 778 S.W.2d 423, 425-26 (Tenn. 1989); *Mitchell v. Archibald*, 971 S.W.2d 25, 29 (Tenn. Ct. App. 1998). Accordingly, appellate courts will not re-evaluate a trial judge's assessment of witness credibility absent clear and convincing evidence to the contrary. *See Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315, 315-16 (Tenn. 1987); *Bingham v. Dyersburg Fabrics Co., Inc.*, 567 S.W.2d 169, 170 (Tenn. 1978).

Wells v. Tennessee Bd. of Regents, 9 S.W.3d 779, 783 (Tenn. 1999).

In ***Lockmiller v. Lockmiller***, No. E2002-02586-COA-R3-CV, 2003 WL 23094418 (Tenn. Ct. App. E.S., filed December 30, 2003), *no appl. perm. appeal filed*, this Court stated:

> The credibility of witnesses is a matter that is peculiarly within the province of the trial court. *See* ***Bowman v. Bowman***, 836 S.W.2d 563, 567 (Tenn. Ct. App. 1991). That court has a distinct advantage over us: it sees the witnesses *in person*. Unlike an appellate court - which is limited to a "cold" transcript of the evidence and exhibits - the trial court is in a position to observe the demeanor of the witnesses as they testify. This enables the trial court to make assessments regarding a witness's memory, accuracy, and, most importantly, a witness's truthfulness. The cases are legion that hold a trial court's determinations regarding witness credibility are entitled to great weight on appeal. *See, e.g.,* ***Massengale v. Massengale***, 915 S.W.2d 818, 819 (Tenn. Ct. App. 1995). In the absence of unrefuted authentic documentary evidence reflecting otherwise, we are loathe to substitute our judgment for the trial court's findings with respect to the credibility of the witnesses.

Lockmiller, 2003 WL 23094418, at *4 (emphasis in original).

A negligence claim requires a plaintiff to prove the following elements: (1) a duty of care owed by the defendant to the plaintiff; (2) the defendant's breach of that duty; (3) injury; (4) causation in fact; and (5) proximate, or legal, cause. *See* ***Naifeh v. Valley Forge Life Ins. Co.***, 204 S.W.3d 758, 771 (Tenn. 2006).

V.

The plaintiff strenuously argues that the trial court's reliance on the defendant's statement to the adjuster is not justified. He contends the evidence reflects that the defendant was not aware of *why* the plaintiff fell until *after* he gave the statement. According to the plaintiff, the defendant first learned that the plaintiff tripped over the feed bowl when – after he had talked to the adjuster – his son told him why he fell. This is not exactly what the record shows.

The defendant's statement to the adjuster reflects that it was recorded over the phone on September 24, 2002. There is a significant discrepancy in the record as to when the defendant became aware of what caused the plaintiff's fall. The plaintiff testified that *his father told him* "a few weeks" after the incident that "it was [the defendant's] fault" because he put the dog bowl on the steps:

> Q. Now, I don't remember whether I asked you or not. Did you have discussions with your dad about what happened?
>
> A. Yes, sir.
>
> Q. All right. What discussions did you have with him?

A. A few weeks later he – he said that, you know, he put the dog food bowl there at the step after I went in with the tools to extract the commode the last time, and he told me in tears, you know, he was crying that it was his fault. He wished he hadn't have done it. You know, he didn't . . .

The defendant testified to a much different story, both as to who told whom what and when the conversation occurred. What follows are excerpts from the defendant's in-court testimony:

Q. Mr. Leslie, when did you put two and two together to try to figure out what had actually happened the night of August 25th?

A. Faye was telling me about walking on the dog food and that stuff was scattered everywhere and pans weren't where I left them, and I just – I just decided that's what . . .

Q. Had you – before you gave that statement to Mr. Dunn for the insurance company, had you ever talked to your son about how it happened?

A. No, I don't think so.

Q. Did you ever hear him tell you what happened to him when he took that step along the step –

A. No.

Q. – before you gave that statement to Mr. Dunn?

A. No, sir.

Q. Did you actually know what happened before you gave that statement to Mr. Dunn?

A. No, sir. Mr. Dunn – Mr. – what's his name?

Q. Greg Dunn?

A. Yeah. He didn't – he didn't put everything in that that we talked about, you know.

Q. Well, what did he not put in?

A. Well, he'd cut that off and we'd talk, and then he'd cut it back on, and I don't know, but he said he had to have a record. So he got that record.

Q. When did you first talk to your son about what had actually happened that day?

A. When these bills started coming.

Q. Was that before or after this statement?

A. You know, I can't remember.

Q. Okay. That's all right. Do you remember – when you did talk to your son, do you remember what he told you had happened to him, why it is he fell?

A. He lost – he lost control or he lost balance or he stepped on something, and when he said stepped on something, that kind of triggered my thinking.

Q. Well, when did your son, Lauren Leslie, tell you he had done that and that triggered your thinking?

A. Probably – probably around Thanksgiving, I guess.

Q. Of 2002?

A. Yeah . . . .

The trial court was faced with the following: (1) a statement to the adjuster dated September 24, 2002, in which the defendant said that he thought his son's fall was the result of "the strain [his son] was in, carrying the commode and going down the steps"; (2) a record devoid of any direct denial by the defendant that he made such a statement to the adjuster; (3) the testimony of the plaintiff that, a *few weeks* after his fall on August 25, 2002, his father acknowledged his fault for the fall because he put a bowl of dog food on the steps; (4) the testimony of the defendant that he had a conversation with his son "around Thanksgiving" 2002 and that something his son said "triggered [his] thinking" and apparently, for the first time, made him think that his placement of the dog bowl on the steps was the cause of his son's fall; and (5) the statement of the defendant that he could not remember whether his Thanksgiving conversation with his son was before or after his September 24, 2002, statement to the adjuster. In view of the totality of the evidence before the trial court, we find no error in the court's decision stressing the defendant's statement to the adjuster. This was a credibility call on the part of the trial court and certainly within its discretionary authority.

In the instant case, the trial court simply did not find the testimony of the plaintiff or his father to be credible as to how and why the plaintiff fell. Under the plaintiff's theory of the case, he was required to prove, by a preponderance of the evidence, that he lost his footing because of the bowl of dog food. The trial court was not persuaded that the bowl of dog food was the cause of the plaintiff's fall. The trial court was troubled by the inconsistency between (1) the defendant's statement given to an adjuster one month after the accident wherein he failed to mention the bowl of dog food and (2) his later and conflicting testimony that his son tripped and fell over the bowl.

When the trial court's credibility determinations are taken into consideration, as they must be, we are unable to say that the evidence preponderates against the trial court's finding that "it's just as reasonable to conclude under these circumstances that the accident was caused by the fact that he was carrying this very heavy commode, had water in it, was having to carry it in a very difficult position." The "bottom line" is that the plaintiff failed to persuade the trial court on the critical issue of causation. The evidence does not preponderate against the trial court's conclusion that the plaintiff's fall, rather than resulting from contact with the dog food bowl, could just as likely have been caused by the plaintiff losing his balance as he attempted to go down steps he could not see at a time when he was carrying a heavy load. Accordingly, we find no error in the trial court's determination.

VI.

In the trial court's opinion from the bench, the court made an alternative finding that, in the event the defendant did place the bowl of dog food on the steps and was negligent in failing to warn the plaintiff, that the plaintiff's own fault in failing to use ordinary care for his own safety outweighed any negligence on the part of the defendant. The plaintiff's final issue is his claim that the preponderance of the evidence is against this alternative finding. Because we have affirmed the trial court's conclusion as to causation, a dispositive holding, we need not decide whether the trial court's alternate conclusion is supported by the record. Accordingly, that issue is pretermitted.

VII.

The judgment of the trial court is affirmed and this case is remanded to the trial court for the collection of costs assessed below, pursuant to applicable law. Costs on appeal are taxed to the appellant Lauren Eugene Leslie.

_____

CHARLES D. SUSANO, JR., JUDGE